In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA, *Appellant*,

v.

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, *Appellee*.

On Appeal from the District Court of Appeal of the State of California, First Appellate District

No. 180

NORMAN E. SEE, *Appellant*,

v.

CITY OF SEATTLE, *Appellee*.

On Appeal from the Supreme Court of the State of Washington

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS, THE CITY OF MALDEN AND THE MALDEN REDEVELOPMENT AUTHORITY, AMICI CURIAE

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Interest of Amici Curiae

This brief is filed pursuant to Rule 42(4) of the Rules of this Court by The Commonwealth of Massachusetts and two political subdivisions thereof: the City of Malden, a municipality located approximately five miles north of Boston, where some 56,000 people live within an area of 4.4 square miles; and the Malden Redevelopment Authority, a public body politic and corporate organized and existing pursuant to section 26QQ of chapter 121 of the Massachusetts General Laws (Ter. Ed.), which is administering Malden's extensive urban renewal program.[1] The City of Malden's code enforcement program, for which a federal grant of more than $635,000 was recently approved[2] and which is fundamental to urban renewal in Malden, would be seriously impeded if the contentions of appellants in the cases at bar were sustained by this Court.

A challenge of the Malden code enforcement program and the procedure by which it is being carried out was rejected—and the validity of that program and procedure was upheld—in a recent decision of the Massachusetts Supreme Judicial Court. *Commonwealth* v. *Hadley,* 1966 Mass. Adv. Sh. 1359, decided December 2, 1966 (see pp. A-1—A-10, *infra*). That case has been appealed to this Court where it is numbered 1179 on the miscellaneous docket; and, inasmuch as the jurisdictional statement in the *Hadley* case was not filed until January 5, 1967, it seems

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[1] Malden presently has, in various stages of development, four different urban renewal projects. Together, those four urban renewal project areas include 478 acres—about one-sixth of the total area of the City—and the aggregate of the gross project costs is more than $28,000,000.

[2] The City is undertaking a code enforcement program pursuant to section 117 of title I of the Housing Act of 1949, as amended, at an estimated project cost of nearly one million dollars.

likely that this Court's decision in the cases at bar will greatly affect the outcome of the *Hadley* case.

The particular facts involved in the *Hadley* case, as stipulated (see pp. A-14 — A-15, *infra*), were as follows:[3] Several years ago, the City of Malden undertook a systematic inspection of many houses in the City in order to discover the degree to which conditions likely to cause disease or fire were present in private houses.[4] Mr. Hadley owned and occupied a single family dwelling in the City, and, in due course, there were addressed to Mr. Hadley repeated requests, both by mail and by telephone, that he make an appointment for the inspection of his house, at his convenience, by the City health inspectors. This attempted inspection was part of a general plan of administrative inspections: Mr. Hadley was in no way treated differently from his neighbors and other Malden residents. Nevertheless, Mr. Hadley refused to allow any inspection, and consequently he was charged with, and convicted of, violation of the Sanitary Code of the Massachusetts Department of Public Health (Art. I, Reg. 3.1)[5] in that he "did wilfully impede or obstruct an inspection or examination by the Code Enforcement Inspector of the Board of Health" of the City of Malden.

Although the *Hadley* case and the cases at bar have a common subject matter and the factual context of the *Hadley* case is somewhat similar to that in *See* and particularly like that in *Camara*, there are important distinctions. In the *Hadley* case the question was whether the Fourth and Fourteenth Amendments to the Constitution forbid

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[3] The Supreme Judicial Court's opinion in the *Hadley* case appears in full as Appendix A to this Brief (pp. A-1—A-10, *infra*). The entire record upon which the *Hadley* case came before the Supreme Judicial Court is reprinted as Appendix B hereto (pp. A-11—A-17, *infra*).

[4] For example, see Appendix C (p. A-18, *infra*), which contains statistics concerning code enforcement in Malden in 1965.

[5] By statutory directive, the Department of Public Health is to

the imposition of a fifty-dollar fine for categorical refusal to allow inspection of a house, at a reasonable time convenient to the householder and to be established by prior appointment, when that inspection was in the course of an area-wide program of reasonable systematic inspections to learn of conditions dangerous to health and safety.

The Malden procedure embodies the maximum degree of accommodation to the householder's convenience. As the Supreme Judicial Court held, in construing the statutes involved, "the code contemplated that such an area inspection would proceed in an orderly manner (but, of course, without undue delay) and with due consideration for the interests and privacy of occupants. The enforcement inspector seems to have acted throughout with commendable respect for the defendant's privacy and convenience. Efforts to make an appointment for an inspection were continued patiently until the defendant unequivocally refused to cooperate at all." (1966 Mass. Adv. Sh. 1359, 1362; p. A-5, *infra*.) The requirement of the Malden procedure that inspection could take place only at a reasonable time and by appointment distinguishes it both from the Seattle ordinance, which contains no requirement that inspection be at reasonable times or on notice or by appointment and from the San Francisco ordinance, which contemplates the inspector's demanding admittance forthwith when he knocks on the door, although he is required to knock at a reasonable time.

The Massachusetts statute is also different in that it involves only a fifty-dollar fine for *willful* obstruction of

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"take cognizance of the interests of life, health, comfort and convenience" of the citizens of The Commonwealth; to "conduct sanitary investigations and investigations as to the causes of disease, and especially of epidemics"; and to "disseminate such information relating thereto as it considers proper". Mass. Gen. Laws (Ter. Ed.) c. 111, § 5, as amended by Mass. Acts 1965, c. 898, approved Jan. 7, 1966.

inspection[6] whereas in both the Seattle and the San Francisco ordinances refusal to permit entry is made a crime punishable by imprisonment—in the latter case, imprisonment up to six months—and willfulness does not appear to be an element of the crime. Moreover, pursuant to the Malden procedure the householder is protected by the right to present in his defense any evidence he might have "(a) that the proposed inspection had no reasonable relation to the enforcement of the Sanitary Code, or was to be made for purposes not within the scope of the code, (b) that it was undertaken without proper authority", "unreasonable, or for any improper purpose, or designed to be a basis for any criminal prosecution (at least until after the defendant had reasonable opportunity to eliminate any violations which might be discovered and had failed to do so)", "or (c) that it was in some significant respect discriminatory, arbitrary, or capricious, or designed to harass the defendant." (1966 Mass. Adv. Sh. 1359, 1363; pp. A-5—A-6, *infra.*)

The foregoing distinctions between the *Hadley* case and the cases at bar demonstrate that code enforcement programs cannot be condemned generically, as the appellants in the cases at bar ask this Court to do. The plain need of the public, including building occupants such as Mr. Hadley, for thorough and efficient code enforcement inspections cannot be denied. The question in each case is whether, balancing the interests of the building occupant (including his desire for freedom from *unnecessary* interference with his privacy) against that plain need of the public, the in-

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[6] As a matter of Massachusetts law an act is willful only if it is "intentional and by design, as distinguished from that which is thoughtless or accidental". *Commonwealth* v. *Williams*, 110 Mass. 401 (1872); see *New England Trust Co.* v. *Paine*, 317 Mass. 542, 59 N.E.2d 263 (1945) (an action is willful only if the result of the act, as well as the act itself, is intended); *Commonwealth* v. *Welansky*, 316 Mass. 383, 397, 55 N.E.2d 902, 910 (1944).

spection proposed can be characterized as violative of the constitutional guarantee against "*unreasonable* searches and seizures". It is impossible to imagine any way in which the occupant's interests can be afforded more consideration than was afforded to Mr. Hadley. There is no sound basis on which a procedure like the Malden procedure can be adjudged "unreasonable".

Summary of Argument

That there is a compelling public need for effective programs to obtain information for the development and enforcement of sanitary and other codes—and corresponding police power to establish and carry out such programs —is not seriously debatable. It is unnecessary to dwell upon the extent to which slums and substandard, unsafe and unhealthy conditions exert a corrosive influence upon the welfare of the inhabitants of the cities and towns of the United States. These evils, this need and this power are amply documented in legislative fact findings by both the Congress of the United States and the several state legislatures and have been recognized and reaffirmed by decisions of both this Court and a multitude of lower courts throughout the country. Indeed, effective health, safety and building codes and thorough enforcement thereof are fundamental to stamping out disease, preventing fires, arresting the spread of blight and promoting the renewal and redevelopment of our cities.

A procedure like the Malden procedure constitutionally achieves a practicable and rational balance between the interests of the individual and the requirements of the public good. Mr. Hadley had ample prior notice of the inspection and the opportunity to select, at his convenience, any reasonable time for it. Even if, despite such notice and opportunity, he had failed to conceal something in-

criminating, he would have had the benefit of existing exclusionary rules which are applicable to, *inter alia*, things seized without a warrant. And, even if an inspection could be deemed to be a technical interference with individual privacy, that interference is plainly *de minimis* and, in the balancing of interests involved, any such interference is overwhelmingly outweighed by the essential requirements of and major benefits to the health and safety of the entire community.

The appellants' claim is contrary to the established rule of law in every state which has considered the question. These decisions, as well as other cases in closely related areas, have uniformly recognized and emphasized the vast disparity between, on the one hand, criminal investigations for the fruits or instrumentalities of crime and, on the other hand, administrative inspections for breeding places of disease and latent sources of fire.

The appellants' case is premised upon importation of the criminal law procedure of a search warrant into the field of administrative inspections. Such an imposition is totally inconsistent with the purposes of and need for effective code enforcement. Effective programs to guard against disease and fire would be impossible if probable cause and a warrant were required before each and every fact-finding inspection: Small fires might grow to holocausts, epidemics might spread out of control and the prophylactic effect of health and safety inspections could be wholly lost unless the administrative agency charged with responsibility for code enforcement is able to gather the necessary facts and data an adequate time before some danger materializes. Such advance information is essential to the quasi-legislative functions of identifying potentially dangerous conditions and formulating appropriate protective programs and also to the administrative functions of warning against conduct or conditions which may threaten the public health or

safety and, where necessary, issuing an administrative order that such conduct or conditions be abated.

Probable cause and warrants are concepts which belong uniquely to the criminal law. If they were injected into the administrative *milieu*, the unfortunate judge presented with an application for an "inspection warrant" would be confronted by a Hobson's choice: either he would be forced to substitute his judgment for that of the administrative agency, thus usurping a function entrusted to administrative expertise; or, otherwise, he would be forced to strip all meaning from the concept of probable cause and convert the issuance of warrants into a mere rubber-stamp procedure, a meaningless and routine formality unworthy of the dignity of a court of law.

Argument

The question in the cases at bar cannot be whether the Constitution permits of reasonable systematic inspections to effectuate a program of area-wide code enforcement. It is decades too late to suggest that society is impotent to provide for the thorough and regular inspection which is so clearly necessary, especially in our urban areas, in order to reduce the risk of fire, to prevent the outbreak of disease, to arrest deterioration and to combat dilapidation and kindred blighting influences—any one of which could cripple or destroy the community. Instead, the question must be what institutions are required to participate in the formation and execution of such a code enforcement program—whether the inspection program can be planned and carried out by the responsible administrative agencies, with resort to the courts only when a recalcitrant's obstructing the program makes it necessary to obtain or enforce an injunction or to impose a fine, or whether the

responsible administrative agencies must apply to the courts in advance for permission to inspect each particular property. We respectfully submit that the Malden procedure affords all due deference to the convenience and privacy of occupants—indeed, as much as is possible without endangering the health and safety of the community—and that super-imposition on that procedure of some kind of warrant requirement would serve no legitimate purpose.

I. The public interest demands adoption and enforcement of effective programs to eliminate health and fire hazards.

The appellants' theory that, in the course of a city-wide inspection program, code enforcement inspectors must obtain search warrants just as if they were policemen is premised upon a fundamental misconception and jeopardizes protection of the health and safety of the people of our cities and towns. The inspectors are in no sense policemen investigating a crime; they are administrative personnel seeking information with respect to conditions which might endanger the health or safety of the residents of the respective cities.

Such information is important for two distinct purposes—the elimination of particular hazards that are identified and the formulation of regulations or legislation for the future—in the words of the Supreme Judicial Court

> "(a) to prevent, and warn against, conduct or conditions which may threaten the public health or safety, or (b) to obtain information about such conduct and conditions as a basis for later administrative action (and possibly, to some extent, legislative action)." 1966 Mass. Adv. Sh. 1359, 1360; p. A-2, *infra*.

The right to conduct systematic area-wide inspections is essential to each of those purposes.

A. *Effective protection against health and fire hazards requires systematic community-wide inspections.*

The importance of periodic health and safety inspections has been demonstrated repeatedly. See, *e.g.*, *Enforcement of Housing Codes*, 78 Harv. L. Rev. 801 (1965); Guandolo, *Housing Codes in Urban Renewal*, 25 Geo. Wash. L. Rev. 1 (1956). In the words of this Court,

> "The need to maintain basic, minimal standards of housing, to prevent the spread of disease and of that pervasive breakdown in the fiber of a people which is produced by slums and the absence of the barest essentials of civilized living, has mounted to a major concern of American government .... Time and experience have forcefully taught that the power to inspect dwelling places, either as a matter of systematic area-by-area search or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health ...." *Frank* v. *Maryland*, 359 U.S. 360, 371-72 (1959).

Regularity of inspections is important, for the knowledge that every property will be inspected on an established schedule and that there will be no deviation from the inspection routine discourages attempts to evade compliance with code standards.

Health and safety inspections seek to protect all persons alike from disease, fire, and all other threats to their safety and well-being, regardless of whether knowingly or inadvertently maintained and regardless of who is responsible for the condition. Inspections are designed to aid and

protect the person and property of the householder, guests and others who from time to time may be in his house, the residents of the community in general and the public at large. Such inspections must also protect occupants—in particular, the tenants of "slum-lords"—who may be prevented from requesting inspection by intimidation, or fear of it.

In other words, it is the responsibility of the government to use its best efforts to warn of rats and to establish procedures for finding and exterminating them before plague claims its first victim and to regulate the use of lanterns in straw-littered barns before a kick by Mrs. O'Leary's cow ignites an entire city. Obviously, to discharge that solemn responsibility the government must be able, without undue delay or hindrance, to look into the places where the rats may be nesting and into Mrs. O'Leary's barn. It is for this reason that administrative officials such as health inspectors have the right to visit and inspect even private houses.

The admission of health inspectors cannot be left to the whim of the individual householder, because the one who bars inspection endangers not only himself, but also other persons who may have no influence upon his decision to refuse: his children, parents, other relations and guests and persons whose business has brought them to the premises. No single person can be permitted to bar his door when by doing so he stands between the state and persons the state has a duty to protect. See *City of St. Louis* v. *Evans*, 337 S.W.2d 948 (Mo. 1960), where a landlord and his agent denied inspectors entry to the rooms of several boarding-house tenants. See *Chapman* v. *United States*, 365 U.S. 610 (1961).

Moreover, any person barring inspection may also imperil his neighbors. Any uninspected building may contain

a potential preventable catastrophe.[7] Therefore, code enforcement programs require total enforcement to be effective. See Stahl and Kuhn, *Inspections and the Fourth Amendment*, 11 U. Pitt. L. Rev. 256 (1950); Comment, 108 U. Pa. L. Rev. 265 (1965). If just one Mrs. O'Leary could exclude the inspector, the inspection of all of the rest of the City of Chicago might be futile.

Fire and disease respect no property lines. A fire starting in one building may explode into a conflagration gutting a neighborhood or an entire community. Filth or faulty water or sewage pipes may begin a process of decay, infection and contagious disease that can spread so broadly and so rapidly that even the most modern developments in medicine are of no avail. Even the twentieth century has been no stranger to the ravages of human death by fire and to epidemics of polio, influenza, typhus and other dread diseases. Any increase in safety of our lives over those of our grandfathers is a product of high standards of public health and safety, implemented by community-wide programs of effective administration of health and safety laws.

Regular inspections are also required in order that the code enforcement agencies may properly discharge their responsibilities, quasi-legislative in character, with respect to formulation and amendment of health and safety regulations and legislation. For example, the Massachusetts Department of Health is expressly directed by the legislature to "conduct sanitary investigations and investigations as to the causes of disease" (Mass. Gen. Laws (Ter.

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[7] Indeed, the suspicion that a condition in violation of the code might be found in his premises—or, a fortiori, knowledge that such a condition was there—is one possible reason for a person's obstructing inspection. In this connection, it is interesting to note that Mr. and Mrs. Hadley at first "stated they would permit an inspection by the code enforcement staff after repairs to the house, which were then underway, would be completed." (p. A-15, *infra*)

Ed.) c. 111, § 5) and to adopt, and, from time to time to amend and modify, a code of health and safety regulations (Mass. Gen. Laws (Ter. Ed.) c. 111, § 127A). This mandate justifies—indeed, requires—that the health inspectors survey conditions in, among other places, privately owned buildings, for the Health Department's formulation and continual review and necessary revisions of the code must be based upon a knowledge of the relevant facts concerning conditions as they exist and change from time to time. See *United States* v. *Rickenbacker*, 309 F.2d 462 (2d Cir. 1962). Thus a systematic program of inspections is essential for the proper performance of the Health Department's quasi-legislative function, and is justified by the public interest in that function, regardless of the presence or absence of specific violations in the particular houses inspected.

B. *Effective code enforcement is fundamental to prevention and elimination of urban blight and decay.*

As this Court said in *Berman* v. *Parker*, 348 U.S. 26 (1954):

> "Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden. They may also be an ugly sore, a blight on the community . . . which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river." 348 U.S. 26, 32-33.

The formulation, administration and enforcement of effective health and safety codes are integral parts of cur-

rent efforts to redevelop, revitalize and rehabilitate our cities.[8] *First*, such codes are by statute prerequisite to federal financial assistance for urban renewal. For example, Title I of the Housing Act of 1949, 48 Stat. 1246, as amended, 42 U.S.C. § 1701, *et seq.*, the basic statute which makes available loans and grants of federal money for surveys and inspections to determine existing conditions and for planning and execution of urban renewal undertakings, provides that, if a municipality does not demonstrate an effective pattern of code enforcement, it may be barred from receiving such federal funds. *Second*, code enforcement and consequent rehabilitation are principal modern weapons in the front line of the battle against urban blight and decay.[9] Wherever rehabilitation is feasible, code enforcement programs and the inspector are certainly more desirable than clearance projects and the bulldozer. Among other things, code enforcement programs are more economical—involving little or no expenditure of public money for land acquisition and clearance costs—and tend to preserve, rather than disrupt, neighborhoods and to reduce problems of relocation—thus avoiding the hardship of displacement of people from their homes and businesses. *Third*, any rehabilitation program must include, as a minimum, the requirement of compliance with applicable codes and effective procedures for administration and enforcement thereof.

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[8] Certain portions of the federal urban renewal statutes which permit and in some instances require code enforcement activities and the authority for such activities in the Massachusetts urban renewal law are quoted in Appendix D to this Brief (pp. A-19—A-22, *infra*).

[9] See generally "Let There Be Commitment", Report of a Study Group of the Institute of Public Administration to Mayor John V. Lindsay of New York City (Sept. 1966). The fact that code enforcement and rehabilitation projects preserve "the unique historical identity and cohesiveness of . . . [a city's] individual communities" is stressed by the 1965-1975 General Plan for the City of Boston and the Regional Core (p. 60).

Among other things, effective code enforcement is a statutory prerequisite for section 220 or section 221 (d) (3) federal mortgage insurance (see section 101 (c) of Title I (p. A-19, *infra*)). And insurance companies are more willing to issue fire and casualty policies and financial institutions are more willing to accept mortgages where there is area-wide code compliance.

In short, code enforcement and rehabilitation comprise the keystone of the national, state and local programs to renovate our decaying cities and to make them safe and healthy as well as desirable places in which to live. That such code enforcement and rehabilitation programs be facilitated and not frustrated is of the greatest public importance. Otherwise urban decay and blight will steadily worsen until total clearance for redevelopment—with consequent greater expense and hardship—becomes necessary. Any substantial impediment to effective code enforcement poses a grave threat not only within the Cities of Malden, Seattle and San Francisco, but throughout urban America.

II. The Fourth and Fourteenth Amendments to the Constitution do not condone appellants' refusal to allow municipal health inspections

The appellants do not make entirely clear the theoretical premises of their allegations of unconstitutionality. However, under any interpretation of the Fourth and/or Fourteenth Amendments, the constitutionality of reasonable administrative inspections pursuant to a systematic code enforcement program should be sustained. Indeed, it is unnecessary on the facts of the cases at bar for this Court to decide questions of such constitutional magnitude as the severability or lack thereof of the two clauses of the Fourth Amendment, see *Rabinowitz* v. *United States*, 339

U.S. 56 (1950), or the precise dimensions of the "intimate relationship" between the Fourth and Fifth Amendments, see *Boyd* v. *United States*, 116 U.S. 616 (1886). In any event, both amendments are now totally applicable to the states. *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Ker* v. *California*, 374 U.S. 23 (1963); *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Murphy* v. *New York Waterfront Comm'n*, 378 U.S. 52 (1964).

A. *The Malden administrative procedure fully protects every legitimate interest of the individual.*

The presumption of constitutionality which surrounds administrative regulations, *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185-86 (1935), is fully warranted by the procedure employed by health inspectors of the City of Malden. This procedure afforded Mr. Hadley ample prior notice and involved no possibility of forcible entry, so that, had the attempted inspection been wrongful (for example, because it was really harassment and not part of a general plan or for any other of a variety of reasons (see p. 5, *supra*)), Mr. Hadley had an opportunity to raise such wrongfulness in an adversary judicial proceeding before his house was entered. He could have asserted such wrongfulness defensively in an injunctive or criminal proceeding brought against him, 1966 Mass. Adv. Sh. 1359, 1363-64; pp. A-5—A-7, *infra*, or he might have brought a suit for declaratory or injunctive relief. In sharp contrast to the Malden procedure, a search warrant is issued in an *ex parte* proceeding and, by definition, the householder would have no opportunity to be heard until after the right of entry granted by the warrant might have been exercised.

The Malden procedure afforded Mr. Hadley opportunity to schedule the inspection at a time convenient to him and to the members of his household, at a time when the inspec-

tion would minimally disrupt their routine. That procedure precludes any sudden, unexpected knock on the door, accompanied by a demand for immediate entry into the home, and the consequent interference with the householder's use and enjoyment of his dwelling. There can be no surprise inspection.

The Malden procedure was also applied in a constitutional manner. The inspector made every reasonable attempt to respect the convenience and privacy of the occupants of the inspection area. As the Supreme Judicial Court found,

> "Efforts to make an appointment for an inspection were continued patiently until the defendant unequivocally refused to coöperate at all . . . . Even then, it was only after additional demands for entry with the defendant's consent that the inspector initiated a criminal complaint. The inspector has not attempted to enter without consent or by force . . ." 1966 Mass. Adv. Sh. 1359, 1362-63; p. A-5, *infra*.

The Malden procedure has the additional advantage, by reason of its prior notice requirements, of stimulating and encouraging code compliance. For example, a conscientious citizen who is, in fact, in violation of the local health or safety code may well use the opportunity given him by the notice period to cure offensive conditions, thereby accomplishing the ultimate purpose for which the codes are designed. Treatment of the householder as a potential criminal will hardly encourage the citizen cooperation so necessary to code enforcement. The inspections in question are after all, not retributive but preventative, intended not to punish but to prevent and/or to correct conditions detrimental to community health and safety; and the best interest of both the individual and the general public require that such conditions be eliminated as speedily as possible.

There is no substantial danger that a code enforcement inspection can be used as a vehicle to obtain evidence of unrelated crimes. The prior notice which is part of the Malden procedure gives anyone who may have been engaging in criminal activities ample time to conceal the evidence, fruits or instrumentalities thereof.[10] Moreover, existing exclusionary rules completely protect him from convictions based on any seizure without a warrant or any search beyond the reasonable ambit of the inspection. *Weeks* v. *United States*, 232 U.S. 383 (1914); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920); *Gouled* v. *United States*, 255 U.S. 298 (1921); *Lefkowitz* v. *United States*, 285 U.S. 452 (1932); *Trupiano* v. *United States*, 334 U.S. 699 (1948); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *Ker* v. *California*, 374 U.S. 23 (1963).

And the courts might well exclude other evidence obtained in the course of a health or safety code inspection —although such an exclusion would be based either on a statutory violation or on general standards of fairness, rather than on constitutional imperatives. Note, *Administrative Inspections and the Fourth Amendment*, 65 Colum. L. Rev. 288 (1965).[11]

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[10] Concealment is advisable, however, for that which is in plain view is not the object of a search. *Ker* v. *California*, 374 U.S. 23, 36-37 (1963); *United States* v. *Lee*, 274 U.S. 559, 563 (1927) (searchlight or field glasses); *United States* v. *Barone*, 330 F.2d 543, 544 (2d Cir.), *cert. denied*, 377 U.S. 1004 (1964); *United States* v. *Williams*, 314 F.2d 795, 798-99 (6th Cir. 1963) (open trunk of automobile); *People* v. *Martin*, 45 Cal. 2d 755, 762, 290 P.2d 855, 858 (1955) (window of house) and cases cited therein. Similarly, the householder has the opportunity to remove or conceal any materials or things without the purview of the inspection which, although perhaps perfectly legal and hence of no concern to the state, may be potentially embarrassing to him. See *Griswold* v. *Connecticut*, 381 U.S. 479, 484-85 (1965).

[11] There are many other exclusionary rules which are not predicated on constitutional grounds. See, *e.g.*, *Mallory* v. *United States*, 354

As the Supreme Judicial Court found, inspections pursuant to the Massachusetts code are not designed to be the foundation for criminal prosecution for code violations.

> "[T]he code's primary purpose from the beginning has been (a) to apply proper health and safety standards reasonably for the protection of the public in the prevention of violations, rather than (b) to punish past violations as criminal offences . . . . We interpret reg. 3.1 as having this type of preventive objective. Only incidentally does it seem designed to provide a basis for criminal prosecutions of past violators."[12] 1966 Mass. Adv. Sh. 1359, 1361-62; p. A-4, *infra*.

In the event that prosecution for code violation, rather than an administrative proceeding for a compliance order, were sought on the basis of the health inspector's observations and other evidence obtained during an inspection, the

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U.S. 449 (1957) and *McNabb* v. *United States*, 318 U.S. 332 (1943) (violation of Federal Rules of Criminal Procedure); *Miller* v. *United States*, 354 U.S. 301 (1958), *Munoz* v. *United States*, 325 F.2d 23 (9th Cir. 1963 and *United States* v. *Poppitt*, 227 F.Supp. 73 (D. Del. 1964) (violation of 18 U.S.C. § 3109); *Nardone* v. *United States* (I), 302 U.S. 379 (1937) and *Nardone* v. *United States* (II), 308 U.S. 338 (1939) (violation of 47 U.S.C. § 605); *Tyler* v. *United States*, 194 F.2d 24 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 903 (1952) (lie detector test); Texas Code Crim. Proc., Art. 38.23 (§ 727a of 1929 edition). Similarly, entrapment, although not itself either illegal or constitutionally reprehensible, is a criminal defense. Entrapment by a state officer is a complete defense to even a federal prosecution. *Henderson* v. *United States*, 237 F.2d 169 (5th Cir. 1956), noted in 70 Harv. L. Rev. 1302 (1957).

[12] A state court's interpretation of a state statute is binding upon this Court. *NAACP* v. *Button*, 371 U.S. 415, 432 (1963); *Terminello* v. *Chicago*, 337 U.S. 3, 4 (1949) and cases cited therein.

According to the definitions suggested by this Court in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) and *Helvering* v. *Mitchell*, 303 U.S. 391 (1938), the fine levied in the present case is a civil penalty. See *Hepner* v. *United States*, 213 U.S. 103 (1909); *Olshansen* v. *Commissioner of Internal Revenue*, 273 F.2d 23 (3d Cir. 1959), *cert. denied*, 363 U.S. 820 (1960).

rights of the defendant in such a prosecution would be adequately protected by the opportunity to move to suppress or strike such evidence or to object thereto at trial. See *Commonwealth* v. *Hadley*, 1966 Mass. Adv. Sh. 1359, 1363; p. A-5, *infra*; *People* v. *Laverne*, 14 N.Y. 2d 304, 200 N.E.2d 441 (1964).[13] Public policy is far better served and the competing interests involved are more wisely reconciled by such exclusionary rules than by a wholesale prohibition or crippling of inspection programs.

B. *The constitutionality of the Malden program of administrative code enforcement inspections is clearly established by relevant precedent.*

It is a settled principle of Anglo-American jurisprudence that the right of a property owner to exclude the universe is limited by consideration of the needs of the public health, safety, morals and welfare. The precise question at bar—the right of fire and health inspectors to make reasonable entry pursuant to a systematic program of inspections—has been considered in eleven reported cases. With but one exception, *District of Columbia* v. *Little*, 178 F.2d 13 (D.C. Cir. 1949) (Judge Holtzoff dissenting), *affirmed on other grounds*, 339 U.S. 1 (1950), every court that has considered the question has recognized the importance of the public interest in prevention and control of disease and fire and has held that, notwithstanding objection of the householder, administrative inspectors may make reasonable inspections for conditions likely to cause fire or disease.

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[13] There is also precedent for the extension of the exclusionary rule into administrative and civil law. See, *e.g.*, *Rogers* v. *United States*, 97 F.2d 691 (1st Cir. 1938); *Lassoff* v. *Gray*, 207 F. Supp. 843 (W.D. Ky. 1962); *Schenck ex rel. Chow Fook Hong* v. *Ward*, 24 F. Supp. 776, 778 (D. Mass. 1938); *Lebel* v. *Swincicki*, 334 Mich. 427, 93 N.W. 2d 281 (1958).

In addition to the cases at bar, those cases included *Ohio ex rel. Eaton* v. *Price*, 168 Ohio St. 123, 151 N.W. 2d 523 (1958), *probable jurisdiction noted*, 360 U.S. 246 (1959), *affirmed by an equally divided Court*, 364 U.S. 263 (1960), a case factually indistinguishable from the *Hadley* case, as well as *City of St. Louis* v. *Evans, supra; Richards* v. *City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1950); *DePass* v. *City of Spartanburg*, 234 S.C. 198, 107 S.E.2d 350 (1959); *State* v. *Rees*, 139 N.W. 2d 406 (Iowa 1966). The factual context in which *Frank* v. *Maryland*, 359 U.S. 360 (1959), arose was slightly different in that the health inspector in that case had reason to believe that there was a specific condition dangerous to health on the defendant's premises; however, Mr. Justice Frankfurter, in his opinion, treated a program of systematic inspections as equivalent to investigation for the purpose of correction of a particular circumstance.

> "Time and experience have forcefully taught that the power to inspect dwelling places, *either as a matter of systematic area-by-area search*, or, as here, to treat a specific problem, is of indispensable importance to the maintenance of community health . . . ." 359 U.S. 360, 372. (Emphasis added.)

Accord, *Givner* v. *State*, 210 Md. 484, 124 A.2d 764 (1955).

Thus, in every case for more than fifteen years, the right of reasonable health and fire inspection without a warrant has been upheld. The analogy between the inspection by health and fire inspectors seeking to discover conditions dangerous to health and safety and police investigators searching for the fruits and instrumentalities of crime has been consistently rejected. The distinction between criminal investigations and civil inspections is deeply embedded in

the history of constitutional adjudication and has long been accepted by the courts and by society. The thrust of the Fourth, Fifth and Sixth Amendments obviously is to protect individuals against forced searches for evidence "to be used in criminal prosecutions or for forfeitures" and it was on this issue that "the great battle for fundamental liberty was fought." 359 U.S. 360, 365. As the Court said in *Frank* v. *Maryland, supra,*

> "Inspection without a warrant, as an adjunct to a regulatory scheme for the general welfare of the community and not as a means of enforcing the criminal law, has antecedents deep in our history." 359 U.S. 360, 367.

These principles have similarly been judicially recognized and reaffirmed in several analogous areas. See, *e.g., North American Cold Storage Co.* v. *Chicago,* 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson* v. *Massachusetts,* 197 U.S. 11 (1905) (compulsory vaccination); *United States* v. *Rickenbacker,* 309 F.2d 462 (2d Cir. 1962) (census questionnaire); *Dederick* v. *Smith,* 88 N.H. 63, 184 Atl. 594, *appeal dismissed for want of substantial federal question,* 299 U.S. 506 (1936) (inspection of domestic animals); *United States* v. *Powell,* 379 U.S. 48 (1964); *Abel* v. *United States,* 362 U.S. 217 (1960); Miller, *Administrative Agency Intelligence-Gathering,* 6 B.C. Ind. & Com. L. Rev. 657 (1965).

III. The search warrant procedure would be foreign to the essential nature of administrative health and safety inspections.

Constitutional standards of reasonableness are the product of an effort to balance individual interests against the common good. Indeed, Anglo-Saxon jurisprudence is pre-

dicated upon the theory that the individual exchanges certain personal privileges for certain other privileges and benefits which the individual receives from the state. In the criminal context, the search warrant is of great importance as a device by which this equation is balanced. In the administrative context, however, a search warrant procedure would serve no useful purpose: it would hobble administrative code enforcement but it would provide in return no greater protection of individual rights. Thus a search warrant requirement imposed upon code enforcement inspections would create—instead of an equation—a senseless imbalance.

A. *Police investigations and health inspections are fundamentally different.*

Health and safety inspections are designed not to mete out retribution for injuries already caused but rather to uncover and correct in advance conditions which might cause harm (see pp. 18-19, *supra*) and to supply information for the administrative agency's fulfillment of its quasi-legislative responsibilities (see pp. 9, 12-13, *supra*). Indeed, this is one of the major differences between police investigations for the enforcement of the criminal law and administrative code enforcement inspections.

A code enforcement inspection is also distinguishable from a police investigation in that health and safety inspections will normally consume less time and be less intimate and personal. Moreover, whereas there is a stigma attached to a visit by the police, no such implication is involved in systematic area-wide inspections.

A police investigation is justified by the suspicion of certain specific acts violative of the penal law. It is obviously logical and meaningful therefore to test the soundness of that suspicion and the probability that such acts

actually have occurred. In other words, what the circumstances of the particular case are is a question involving facts which are susceptible of proof, and whether those circumstances justify search and seizure by the police is a justiciable issue appropriate for determination by a court.

In contrast, the right to make health inspections does not depend upon any special facts concerning any particular building. The necessity for such inspections is a matter to be determined in the expertise of the administrative agency charged with code enforcement and the related quasi-legislative functions and is therefore not a justiciable issue.[14]

The appellant in *Camara* asks, at page 21 of his Brief,

> "In those situations where the occupant will not allow him to enter, will not in almost all instances an inspection of the exterior, complaints from neighbors or the process of elimination of other causes of a specific effect show grounds upon which a search warrant could issue?"[15]

Plainly, the answer to that question must be "No". It is absurd to suggest that the inspector cannot eliminate potential causes of fire and cannot enter until he can see smoke from outside. Moreover, as has been demonstrated (pp. 11-12, *supra*), "*almost* all instances" is not enough,

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[14] *Moog Industries* v. *Federal Trade Comm'n*, 355 U.S. 411 (1958); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125 (1939); *Moskow* v. *Boston Redevelopment Authority*, 349 Mass. 553, 210 N.E. 2d 699 (1965), *cert. denied*, 382 U.S. 983 (1966).

[15] An adequate system of health and safety inspections cannot be premised upon complaints, which could support a showing of probable cause, because, universally, experience has been that only a minute proportion (less than five per cent) of violations become the subject of complaints. Therefore code enforcement based only on complaints would fall far short of the systematic program which is necessary.

for one germ or one spark can spell disaster for the entire community.

B. *Traditional standards of probable cause are not meaningful in the present context.*

As has been demonstrated (pp. 11-12, *supra*), the prime distinction between the policeman and the health inspector is that whereas the policeman is seeking to apprehend the perpetrator of a crime already committed, the inspector is seeking to uncover circumstances detrimental to health and safety *before* any injury is sustained. If it were required that there be evidence of existing injury before an inspection were to be permitted, a health inspection could serve no preventive purpose, for the evidence required before a warrant may issue is most often not apparent outside of the building. Sources of potential danger that may start a conflagration or a widespread contagion are not ascertainable without actually seeing them. Many conditions which are particularly dangerous and therefore particularly of concern for purposes of health inspections (such as piles of oily rags and backed-up toilets) are concealed behind building walls where they cannot be detected or, normally, even suspected prior to inspection and therefore could not possibly be cited as "probable cause" for an inspection.

Even the dissent in *Frank* v. *Maryland, supra,* apparently recognizing the inapplicability of traditional probable cause standards, suggested as a substitute a watered-down version of probable cause:

> "Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an infer-

> ence where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant." 395 U.S. 360, 383.

That suggestion, however, offers no solution to any problem. If the warrant procedure is to become a mere "rubber-stamp" process, pursuant to which warrants will be issued in quantity upon a showing that there is a neighborhood inspection plan, and without any review of that plan, then the procedure, although bothersome to the administrative agency, offers no protection to the householder and is unworthy of the dignity of a court of law. But the frequency and extent of systematic health inspections are matters entrusted by the legislature to determination by an administrative agency in its expertise, and therefore if the court were to entertain an attack on the plan, and to substitute its judgment as to the appropriateness of inspections for the expertise of the agency, it would thus virtually usurp the role for which the agency is uniquely suited. In neither case does the suggested procedure present a justiciable issue or an appropriate function to be performed by a court of law.

The magnitude of the public need for meaningful programs of code enforcement and rehabilitation has been amply documented. Any minor interference with individual privacy which might result from implementation of those programs is overwhelmingly outweighed by the public need for effective code enforcement and rehabilitation programs and the benefits such programs afford to all members of our urban society. The appellants' assertion of a so-called

right to obstruct those programs is without basis in the Constitution or our jurisprudence and has been rejected by every state court which has considered it. It should be similarly rejected by this Court.

Conclusion

For the reasons stated, the decisions of the courts below should be affirmed.

Respectfully submitted,

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